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To: Lorraine D. Hunt OIRA ECON GUIDE/OMB/EOP@EOP
cc:
Subject: Comments on OMB's Draft Guidelines for the Conduct of Regulatory Analysis

Dear Ms. Hunt:

Attached is a cover letter and comments from the National Association of Home Builders (NAHB) on the Office of Management of Budget's "Draft Guidelines for the Conduct of Regulatory Analysis," which appears at Appendix C of the Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations. These comments are being submitted in response to OMB's request for comments that appeared in the Federal Register on Monday, February 3, 2003.

Please feel free to contact me at (202) 266-8305 if you have any questions or require additional information.

Bruce Lundegren

<<OMB Report to Congress.2003.Cover.NAHB.doc>>
Report to Congress.2003.Comments.NAHB.DOC>>

<<OMB

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Gerald M. Howard
Executive Vice President
and Chief Executive Officer

April 30, 2003

BY ELECTRONIC MAIL

Ms. Lorraine Hunt
Office of Information & Regulatory Affairs
Office of Management & Budget
NEOB, Room 10202
725 17th Street, NW
Washington, DC 20503
OIRA_ECON_GUIDE@omb.eop.gov

Re: Comments on *OMB's Draft Guidelines for the Conduct of Regulatory Analysis*

Dear Ms. Hunt:

On behalf of the more than 205,000 members of the National Association of Home Builders (NAHB), I am pleased to submit the attached comments on the Office of Management of Budget's (OMB's) *Draft Guidelines for the Conduct of Regulatory Analysis (Draft Guidelines)*, which appears at Appendix C of the *Draft 2003 Report to Congress on the Costs and Benefits of Federal Regulations* and was published for public review and comment in the *Federal Register* on Monday, February 3, 2003.

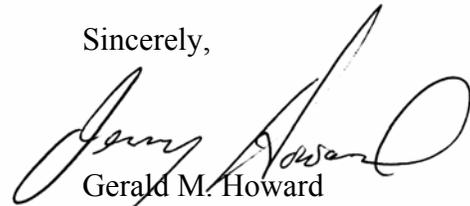
NAHB is a federation of more than 850 state and local home builder associations nationwide. Our members include individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. Over 80 percent of our members are classified as "small businesses" and our members collectively employ over eight million people nationwide. As such, our industry is directly and indirectly impacted by a wide array of regulatory actions across the spectrum of Federal agencies.

NAHB is keenly interested in OMB's *Draft Guidelines* and the important work OMB's Office of Information and Regulatory Affairs (OIRA) is doing in the area of centralized regulatory review. We generally support the approach taken by OMB in the *Draft Guidelines* and believe most agencies will improve their performance if they follow OMB's approach. We also agree that it is appropriate that agencies be directed to explain why a regulation is needed, why it must be done at the federal level, whether the regulation can accomplish the intended goal, and whether the regulation does more good than harm, with a presumption against economic regulation. These ideas are detailed further in our attached comments.

Ms. Lorraine Hunt
April 28, 2002
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Thank you for the opportunity to comment on OMB's *Draft Guidelines*. Please feel free to contact me or NAHB's Regulatory Counsel, Bruce Lundegren, at (202) 266-8305 if you have any questions or require additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Gerald M. Howard", written in a cursive style.

Gerald M. Howard
Executive Vice President
and Chief Executive Officer

Attachment

GMH/bel

National Association of Home Builders

Comments On OMB's Draft Guidelines for the Conduct of Regulatory Analysis

Appendix C of the 2003 Annual Report to Congress on the Costs and Benefits of Federal Regulations

April 30, 2003

Generally, the National Association of Home Builders (NAHB) supports the approach taken in OMB's "Draft Guidelines for the Conduct of Regulatory Analysis" (Draft Guidelines), *68 Federal Register 5513*, and believes most agencies would improve their performance if they followed this draft. Specifically, NAHB agrees that it is appropriate that agencies be directed to explain why the regulation is needed, why it must be done at the federal level, whether the regulation can accomplish the intended goal, and whether the regulation does more good than harm, with a presumption against economic regulation.

The proposal correctly directs the agencies to determine who will be affected by the regulation, and in what ways, and directs the agencies actively to seek the opinions of the regulated community, and recommends flexibility in regulation for different regions of the country and firms of different size. NAHB agrees with the preference given to market approaches over direct controls, and calls attention to the diminishing return and increasing cost of greater stringency. Further, NAHB supports the requirements for agencies to consider alternatives, and the preference for performance standards over design standards.

All of this makes economic sense and provides a good framework for economic analysis. Accordingly, NAHB supports OMB's efforts to improve the document even further, and offers the following comments:

1. OMB Seems to Confuse Benefit-Cost Analysis and Cost-Effectiveness Analysis

The Draft Guidelines blur the difference between benefit cost analysis (BCA) and cost effectiveness analysis (CEA). BCA compares the costs of an action to its expected benefits, to inform the decision of whether to take the action or not. It is dichotomous by nature, though BCAs could be conducted on several different regulatory options at the same time. On the other hand, CEA compares the costs, and only the costs, of different regulatory options to achieve the same goal. CEA does not weigh benefits, and it is appropriate where the obligation to take an action is undisputed, but an agency has a choice of methods to achieve it.

In parts of the draft, OMB seems to suggest that both a BCA and a CEA be conducted, but the premises of the two approaches are inconsistent. BCA should be

used when the agency has some choice over the extent or existence of regulations; whereas CEA is only appropriate when the agency is limited to a choice over the method to achieve a mandated objective.

2. Agencies Should Be Required to Analyze Distributional Effects.

Any regulation, rule, or administrative action is going to make some people better off and some people worse off. Such actions can still be economically efficient if the winners receive enough benefit so they could compensate the losers for their losses, and retain some incremental benefit. If compensated, the losers would have no grounds for complaint, since they were made whole; they are no worse off than before. The gainers are better off than before, so the administrative action would be an unambiguous improvement in economic well-being. Because potentially the gainers could compensate the losers and still keep some benefit, the action has positive net benefits, and it is called "Potentially Efficient" or "Kaldor-Hicks Efficient."

However, that compensation is never paid in practice. The gainers keep all of their gains, and the losers bear all of their losses. Therefore, it is essential to pay attention to who bears the burden of the regulation and who receives the benefits; this problem is called the "incidence" of the regulation. Section III (D) of Appendix C allows consideration of such issues as fairness, and it quite rightly says that such issues are especially important when there is a great disparity in the effects a regulation would have on different groups of people.

NAHB urges OMB to make distributional issues an important part of regulatory analysis. After determining the benefits and costs, agencies should identify who will be affected, then examine whether it is appropriate to saddle them with that burden. In some cases, the most cost effective or most efficient choice will place intolerable burdens on some citizens; in those cases, a choice with lesser net benefit may be the best choice.

3. Benefit-Cost Analysis May Not Always Be Appropriate Because of Other Social Purposes.

Some government programs are not intended to address market failures, as the discipline of economics defines them. Programs to secure equality of opportunity, to provide a free public education, to battle the use of drugs, and to improve access to decent housing are designed to execute policies the nation has adopted to improve society. Such programs may fail a market-based BCA, because there is no market failure to correct. However, these national policies have been enunciated, and regulations will often be needed to effectuate them. In these cases, BCA may be misleading, because the apparent benefits are smaller than the apparent costs. However, society has mandated the policies to advance non-economic values, so the issue becomes the most cost-effective way to accomplish them. When society chooses to advance other values, efficiency is no longer the *sine qua non* of

regulation, and regulations may be optimal even though they do not pass the Kaldor-Hicks efficiency criterion.

Many of these social policy issues intertwine with distributional issues, with the same implication: the policy with the greatest net monetized benefits may not be the best choice.

4. Undesirable Side Effects and Ancillary Benefits Must Be Taken Into Consideration.

OMB is to be commended for recognizing that ancillary benefits and costs should be taken into consideration. Often it is not the primary initial effect of a regulation that creates problems, but rather the consequences induced by the regulation later. However, some secondary effects are often captured quantitatively in price changes as direct effects of the proposed regulation. To add the secondary effects to the primary ones would be double counting, and it would exaggerate the effects, positive or negative. The monetized secondary effects should be added to the primary effects only when it can be shown that the primary effects do not incorporate secondary effects. For example, an irrigation project will make the irrigated land more valuable, because it can grow more crops. The land price change is the primary effect, and it captures the increased productivity of the land in the future. There will also be more crops, a secondary effect (at least locally) whose value should not be added to the increase in land value, since the crop value is already reflected in the land value. That is double counting.

However, sometimes the side effects are not counted in the primary effects, or they are counted perversely. For example, when a locally large amount of land is withdrawn from development for a forest preserve, local land prices will rise due to the supply constriction. Some agencies have fallen into the trap of calling this price rise a benefit, though the guidelines correctly state that such increases in "value" should not be counted as benefits, because they are scarcity rents. *68 Federal Register 5524*. However, one side effect is that housing prices will rise, making housing less affordable. This would conflict with the policies of the National Housing Act of 1949, which establishes the goals of "a decent home and suitable living environment for every American family." Similarly, an environmental regulation may raise the cost of doing business, raising the cost of output and reducing the amount sold. The lost output is a direct cost of the regulation. Fewer workers are needed to produce the reduced output, so some of them are laid off. Their lost income is a secondary effect, and it cannot be added to the primary effect, because it has already been counted. However, the increased unemployment is very important, and it needs specific attention.

Therefore, secondary or ancillary effects must be taken into consideration, even if they are not included in BCE or CEA calculations. The induced non-monetized effects may be the very ones society cares about the most.

5. Agencies Should be Required to Consider the Cumulative Effects of Their Proposals on Other, Existing Regulations So the Total Regulatory Cost Can Be Evaluated.

The guidance is seriously mistaken about the treatment of interaction or cumulative effects. *68 Federal Register 5515*. If an agency is considering a rule package containing several provisions, it is the effect of the alternative packages that matters, not the effect of each provision standing alone. The effect of one provision is only relevant when the agency choice is whether to adopt that provision alone, rather than some other single provision.

OMB is right to recognize that rules operate in the context of other rules, and that a change in one rule may change the costs or benefits of another. But it would be a mistake to say the marginal cost of a rule is its effect considered in isolation; the marginal cost is the rule's effect in the context in which it regulates, which includes the effect the proposed rule has on the costs and benefits of other rules. The net benefits of the regulation with and without the proposed provision is not really the conclusive test of whether that provision belongs in the regulation; complete exclusion of the provision is often only one option available to an agency. If the number of regulatory permutations and combinations is so large that the agency can examine only a subset of possibilities, the subset should cover the whole range of legally permissible, physically possible, and economically practical alternatives, rather than focusing on a small range of very similar alternatives.

Not only may one agency consider several simultaneous rules and provisions, but other agencies may also be regulating the same activity. For example, it is easy to see how an activity could be regulated simultaneously by the EPA, the U.S. Forest Service, the Bureau of Land Management, the Fish and Wildlife Service, and the National Marine Fisheries Service. In that case, each agency's decisions operate in the context of the others. Therefore, an agency should consider the existing regulations of other agencies in drafting its own proposals. Proposed rules should be consistent with existing regulations of all federal agencies. Simultaneous regulation has BCA implications, as well. If each agency conducts its own BCA, and each agency's separate regulation is weighed against the same benefit, then multiple costs are weighed against one benefit without that cost multiplication appearing anywhere. Therefore, it is incumbent on the Executive Branch to be sure that the total regulation package from all agencies does not exceed the benefit of those regulations.

6. Baseline Should Not Include Assumptions About Technical Change Or Regulatory Changes By Other Agencies.

NAHB supports the basic definition of a baseline as stated by OMB, "the way the world would look absent the regulation." *68 Federal Register 5517*. However, the agency needs to determine a baseline under *ceteris paribus* assumptions for conditions that are not under the agency's control. The agency may be able to make proper forecasts of demographic and economic changes, but the agency should not

make baseline assumptions about technological change or change in the regulations of other agencies. Neither should the agency assume any change in compliance with other rules, unless it is considering a rule that would have that effect. Therefore, in general, the baseline will be the state of the world as it is at the time the regulation is considered, with all current trends continuing on their current paths except as affected by the rule or other events that can be predicted with certitude.

For regulations that only restate statutory mandates, the baseline is irrelevant, as are the costs and benefits. Not only has the agency no discretion, it has no decision to make. Rather than apply a pre-statutory baseline, there is no baseline to apply, because there is no benefit/cost measurement to be made. However, when the agency is making a decision pursuant to self-executing statutory provisions, rather than merely repeating them, there is a decision to be made, and baseline becomes relevant. The state of the world absent the regulation is the state of the world with the statute in place, but without the consequent regulations. Whenever a regulation effects a distribution of rights or obligations in addition to that effected by the statute, the post-statute, pre-regulation state of the world is the relevant baseline.

7. Agencies Should Be Extremely Cautious When Trying to Monetize Non-Marketed Resources.

Prices from competitive markets with little regulation should be the preferred measures of value, but it is possible that something may have value, yet not be traded. Monetizing the immeasurable is surely a daunting task, and the results may not be worth the effort. The cautions stated for contingent valuation are correct, but they are no guarantee that accurate estimates of value will come from a study that follows all that advice.

Benefits transfer carries even more danger, as it could apply a contingent valuation to a good, resource, or characteristic that is altogether different from the subject of the contingent valuation study. These may be cases where bad "data" are worse than no data at all. As the guidance states, "[T]here is no economic theory that can describe hypothetical behavior," so the economic and statistical inference links are highly attenuated. *68 Federal register 5519.*

OMB may wish to give more emphasis to its correct statement "When important benefits and costs cannot be expressed in monetary units, BCA is less useful, and it can even be misleading, because the calculation of net benefits in such cases does not provide a full evaluation of all relevant benefits and costs." *68 Federal Register 5516.*

8. Agencies Should Defer Decision Making Where Data Are Insufficient Or Lacks Quality.

In several places in the Draft Guidelines, such as the discussion of contingent valuation and the discussion of uncertainty, OMB airs problems posed by lack of data. Some approaches are suggested where the problem is that the desired data are

unobservable, like the issues of non-marketed resources. However, OMB gives insufficient attention to cases where data exist, but they are lacking in quality or quantity. It is suggested that agencies may wish to defer decision-making in order to gather more data, apparently in the case where the agency faces a known probability distribution, but has only small samples whose large standard errors prevent credible statistical testing.

OMB states that the analysis must be “credible, objective, realistic, and scientifically balanced.” Agencies are directed to discuss the quality of the data they have used. They are even directed to conduct sensitivity analyses of the implications of changes of input data. However, no guidance is given about when the data are insufficient to support a decision, either because they are so few in number, or they are gathered improperly. The only remedies in the guidance are discussion and disclosure. But agencies currently disclose paltry data and excuse their reliance by saying it is all the data they have, therefore it is the best data they have. Indeed, they may be the only data that exist; therefore they are the best data available. This description could be used to trump all criticism of the data; no regulation could fail because of bad data.

NAHB urges that OMB and the regulatory agencies to recognize that sometimes, there just may not be enough data to justify a decision. The fact that is the best dataset available does not mean it supports an inference. Just as it is no use to have the best airplane at the airport if it doesn't fly, it is no use to have the best available data if they cannot support an inference. If the data are gathered badly, contrary to approved methods of the relevant discipline, then they cannot give rise to any conclusion. Such observations and reports are not data in any scientific sense; they are merely a collection of anecdotes with no systematic relation to each other. “Data” are not just the plural of “anecdote;” data are a set of observations gathered in a scientifically approved manner, so that the probabilities of mistake are known. Decisions based on anything less are arbitrary government.

In cases where the data are inadequate, the agencies should be required to gather additional data. The investigation must not be structured to test the agency's hypothesis or to prove any particular point, but rather the investigation should be to discover the truth of relevant facts.

9. Simulations And Alternatives to Statistical Analysis Should Only Be Used When No Other Method Is Available.

On page 5523 of the Draft Guidelines, *68 Federal Register 5523*, OMB suggests methods to use to quantify uncertainty when normal statistical or probabilistic methods are not available. It is troubling that OMB recommends the use of simulations, a method whose output should not be confused with analysis. Simulations have all of the dangers of contingent valuation, and they can be done without well-formed, meaningful questions. Simulations should only be used when no other method is available; they are the least-preferred method among those listed in the guidance. Any simulations should be documented carefully, including the

assumptions, equations, and data, as well as identification of the analysts and their qualifications.

Delphi methods are even more troubling. Any resort to expert judgment should include full identification of the experts, their qualifications, their publication and testimony histories, and any contractual relationships with the agency or interested parties. Agency employees should not be used for this sort of validation, and the agency should avoid using the same experts repeatedly.

10. Agencies Should Not Be Allowed To Assume Technological Change Unless It Is Both Physically Possible and Economically Practical.

Section IV, E, 1, *Other Key Consideration*, 68 *Federal Register* 5524, addresses several cost considerations, most of which are reassuring. Agencies are advised to consider compliance costs, inconvenience, and time loss, which are sometimes forgotten in hastily performed analyses. The inclusion of these costs is an asset to the guidance. However, OMB steps on much shakier ground in its discussion of technological change. While it is certainly true that incentives may lead to innovations, it should not be assumed that any particular intensity of innovation will follow a change in incentives. While the motives for innovation may be economic, the process is technological. There is no reason to believe that a technology will appear, just because it is useful.

While agencies should recognize that technical change does occur, and regulatory structures should not only accommodate but reward innovation, agencies should make no assumptions about the appearance of any particular technologies in the future. No technology should be assumed unless it has been shown to be both physically possible and economically practical.

11. OMB's Guidelines Should Provide More Stringent Transparency Requirements, Including Disclosure Of Data, Models, and Methodologies.

OMB should be praised for the emphasis given to transparency in this Draft Guidelines. NAHB urges further specificity in the guidance to promote transparency. Not only should the agency make public its reasons for believing regulation is necessary and that the proposed regulation will help solve the problem, but it should also disclose the models used to make the determination, the way data were gathered and handled, and the data themselves should be released to the public unless exempted in the same manner that information can be withheld under the Freedom of Information Act (FOIA). Only in that way can the analysis meet the data quality guidelines goal of reproducibility.

When the agency relies on outside consultants, those consultants should be identified, along with any history of employment or contractual relationship with agency or interested parties, including research grants. Continued use of one consultant may be

taken to mean there is an implicit relationship with the agency that derogates the agency's reputation for impartiality and open-mindedness.

Data must be viewed as the cornerstone of the agencies' regulatory actions. As such, all data relied on in making decisions must meet high standards of quality and be available to the public for review and analysis.

12. Uncertainty With Federal Regulations Is Usually Related To a Lack of Data and A Failure By the Agency To Obtain It.

NAHB agrees with OMB that uncertainty arises from "various and fundamentally different sources. These include the fundamental unpredictability of various natural and social phenomena, but they also include lack of data and the lack of knowledge about key relationships resulting from limitations in fundamental scientific knowledge (both social and natural)." *68 Federal Register 5523*. NAHB has observed that the level of uncertainty associated with regulatory options when federal regulations are being promulgated is most often related to a lack of data brought about by the failure of the agency to commit the resources necessary to conduct the research needed to get the missing information.

Where data are lacking, the "Draft Guidelines" say that the agency "might" consider deferring the decision, as an explicit regulatory alternative, until further study is done. NAHB believes the agency "must" be required to consider deferring the decision where there are a lack of data upon which to base regulatory options and must be required to justify why moving forward with the regulation is warranted. NAHB recognizes that in some instances, it is in the best interest of the public or environment to make regulatory decisions even on scant information because the risk of 'doing nothing' is so great. This would be true where it can be shown that taking no action might result in the irreversible or irreparable harm to a species, a segment of a population, or to the environment. However, it is apparent to NAHB that unless agencies are required to consider deferring a decision where there are a lack of data and are required to go through the steps to weigh the benefits of a delay against the costs of making a decision, regulations will continue to be promulgated using scant data, and the practice of making decisions on information without scientific merit will continue.

OMB should be mindful that courts give wide deference to agencies in lawsuits that involve questions of the scientific merit of information used to make regulatory decisions. As the U.S. Court of Appeals for the Ninth Circuit recently remarked, EPA is not required to conduct the "perfect study." *Environmental Defense Center, Inc. v. EPA*, 319 F.3d 398, 442 (9th Cir. 2003). In that case, the court upheld EPA's Phase II storm water permit program and decided that the administrative record contained sufficient data to support the agency's ultimate decision to regulate small construction sites. The court deferred to EPA's decision "to use available data unless there is no rational relationship between the means EPA uses to account for any imperfections in its data and the situation to which those means are applied." *Id.* The

court recognized that industry petitioners, including NAHB, failed to enter into the administrative record any data or evidence contradicting the scant information upon which EPA relied. *Id.* at 441.

NAHB believes that challengers to agency action should not have to bear the burden to submit contradictory data in situations where decisions are made using scant data. As a result of the courts giving wide deference to agencies and having a low standard for data completeness, NAHB believes that the agencies are not committed to removing uncertainty. NAHB urges OMB to revise the "Draft Guidelines" to make it mandatory for agencies to consider deferring decisions on regulatory options when a lack of data or understanding are apparent.

13. OMB Should Define the Terms "Lack of Data" And "Lack of Knowledge."

NAHB urges OMB to modify the "Draft Guidelines" to define what "lack of data" and "lack of knowledge" means in the regulatory development sense. For example, if a national standard is being developed where geographical differences are known to be of importance, and representative data are not available from all regions, this should be defined by OMB as a clear example of a "lack of data", and the agency must be required to consider deferring a decision and must be required to justify their decision.

14. Federal Agencies Should Have An Affirmative Obligation To Obtain Necessary Data.

NAHB believes agencies should place a high priority on getting the data needed to support their regulatory decisions by committing the resources necessary to accomplish this. During the development of the Effluent Limitation Guidelines (ELGs) and New Source Performance Standards for the Construction and Development Category by EPA, EPA decided early on to rely on existing data and did not commit the resources needed to get information directly from construction operators and to get monitoring data and in-stream data needed to assess adequately the financial impact of the regulatory options and to characterize accurately storm water discharges from construction sites and the in-stream effects resulting from them. As a result, the three support documents developed by EPA in support of the proposed ELGs for the construction industry lack sufficient data to substantiate the need for the ELGs and to support the regulatory options proposed.

In view of the EPA's and DOI's budgets, it is not unreasonable for the public to expect the agency to reduce as much uncertainty from their decisions as possible when developing regulatory options relevant to the environment. EPA's proposed budget for FY 2004 is \$7.6 billion dollars, has funding for almost 18,000 employees nationwide¹, and includes \$357 million or 4.7% of the total budget to support "sound

¹ Pages xiii and xiv, US EPA FY 2004 Budget; <http://www.epa.gov/ocfopage/budget/budget.htm>; downloaded April 17, 2003.

science” (Goal 8).² DOI’s proposed budget for FY 2004 is \$10.6 billion³ with slightly less than \$1 billion of DOI’s budget for the Fish and Wildlife Service⁴, has funding for over 70,000 employees with almost 9,000 of the employees assigned to the Fish and Wildlife Service⁵, and has funding within U. S. Geological Survey for \$605.2 million to “support the advancement of science in decision making processes across the Department, as well as in the States and local communities Interior serves.”⁶

Thus, NAHB urges OMB to revise the Draft Guidelines by requiring the agencies to remove as much uncertainty as possible from their regulatory decisions by using all means possible rather than all means within funding limitations. In other words, the uncertainty should most often be associated with the “fundamentally unpredictability of natural and social phenomenon” and not a lack of data or knowledge resulting from an agency simply choosing not to commit the resources to get the data or to develop the knowledge base needed to lessen or eliminate uncertainty.

15. The Public Would Have More Confidence In Agency Actions If They Were Based On More Rigorous Analysis.

NAHB generally agrees with the two fundamental components of the analysis required when dealing with uncertainty - 1) the quantitative analysis, and 2) assignment of economic values to the projected outcomes - and believes that if the agencies really put into practice the analyses described, the public would have more confidence in the decisions that the agencies make. However, it is unclear whether the Draft Guidelines, when issued in final form, will have the intended impact. NAHB urges OMB to make the language stronger so that agencies will be compelled to adhere to the guidelines.

16. OMB Should Adopt Uniform Analytical Requirements For All Regulations It Reviews.

NAHB urges OMB to require the same analysis on all rules that must be reviewed by OMB under Executive Order 12866 (\$100 M or more, etc.), not just those that meet the \$1 billion threshold cost. In addition, OMB should clarify how it arrived at the separate \$1 billion figure in the first place, since it is not at all apparent why this number was selected except that it seems really large.

² Ibid., page 8-1.

³ Page DO-3, “Budget Overview”, Department of the Interior, Fiscal Year 2004; <http://www.doi.gov/budget/2004/04Hilites/toc.html>, downloaded April 18, 2003.

⁴ Page DO-10, “Budget Overview”, Department of the Interior, Fiscal Year 2004; <http://www.doi.gov/budget/2004/04Hilites/toc.html>, downloaded April 18, 2003.

⁵ Page M-1, “Staffing, Appendix M”, Department of the Interior, Fiscal Year 2004; <http://www.doi.gov/budget/2004/04Hilites/toc.html>, downloaded April 18, 2003.

⁶Page DH-50, “Science for Communities”, Department of the Interior, Fiscal Year 2004; <http://www.doi.gov/budget/2004/04Hilites/toc.html>, downloaded April 18, 2003.

It is apparent from the data presented in Table 7⁷ (attached), that most of the regulations reviewed by OMB will not have to meet the most stringent components of the regulatory analysis relevant to dealing with uncertainty. As shown on Table 7, only 3 of the 25 major rules finalized in the 3-year period between 1992 and 1995 have cost estimates that meet the \$1 billion dollar threshold.

If OMB does not agree with the removal or modification of this \$1 billion threshold, NAHB urges OMB, at the very least, to add a threshold related to the impact on small businesses, so that a more rigorous analysis, equivalent to that required for rules that meet the \$1 billion dollar threshold, is required when a regulation is being developed that significantly impacts a substantial number of small businesses.

17. OMB Should Replace Some of the Optional (“Should”) Requirements With Mandatory (Must”) Requirements.

NAHB believes the Proposed Guidelines would be substantially strengthened and improved if some of the optional, “should” requirements were made binding. For example, we recommend the following specific changes to improve the Draft Guidelines. The pages numbers below refer to pages within 68 *Federal Register*, February 3, 2003:

- ✓ Page 5523, third column, first paragraph: “You ~~should~~ must describe the assumptions and the models you used and their impact on the overall analysis.”
- ✓ Page 5523, third column, second paragraph: “In the absence of adequate data, you will need to make assumptions. These ~~should~~ must be clearly identified and consistent with the relevant science. Your analysis ~~should~~ must provide sufficient information for decision-makers to grasp the degree of scientific uncertainty and the robustness of estimated....” “~~For major rules involving threshold costs of \$1 billion, Y~~ou ~~should~~ must present a formal quantitative analysis of the relevant uncertainties.” (Or alternatively: “For major rules involving threshold costs of \$1 billion or for rules impacting a large proportion of small businesses, you ~~should~~ must present a formal quantitative analysis of the relevant uncertainties.”
- ✓ Page 5523, third column, third paragraph: “In your analysis you must ~~should~~ ~~try to~~ provide some estimate of the probability distribution of risk with and without the regulation, ~~and you must do this for rules that exceed the \$1 billion threshold.~~” (Or alternatively: “In your analysis you should try to provide some estimate of the probability distribution of risk with and without the regulation, and you must do this for rules that exceed the \$1 billion threshold or for rules impacting a large proportion of small businesses.”

⁷ Pages 5499 – 5501, 68 *Federal Register*, February 3, 2003.

- ✓ Page 5523, third column, fifth paragraph: “*Acceptable Analytical Approaches*: Whenever possible, you should use appropriate statistical techniques to determine a probability distribution of the relevant outcomes, and for rules that exceed the \$1 billion threshold or for rules impacting a large proportion of small businesses a formal quantitative analysis is required.

- ✓ Page 5523, third column, seventh paragraph:
 - “Disclose qualitatively the main uncertainties in each important input to the calculation of benefits and costs. These disclosures should address the uncertainties in the data as well as in the analytical results. However, major rules above the \$1 billion threshold or for rules impacting a large proportion of small businesses require a formal treatment.

- ✓ Page 5524, first column, first paragraph, last sentence:
 - “...Again, however, major rules above the \$1 billion threshold or for rules impacting a large proportion of small businesses require a formal treatment.

- ✓ Page 5524, first column, second paragraph:
 - “...Apply a formal probabilistic analysis of the relevant uncertainties—possibly using simulation models and/or expert judgment as revealed, for example, through Delphi methods. Such a formal analytical approach is appropriate for complex rules where there are large multiple uncertainties whose analysis raises technical challenges, or where the effects cascade, and it is required for rules that exceed the \$1 billion threshold or for rules impacting a large proportion of small businesses.

TABLE 7.—ESTIMATE OF BENEFITS AND COSTS OF 47 MAJOR RULES OCTOBER 1, 1992 TO MARCH 31, 1995
 [Millions of 2001 dollars]

Regulation	Agency	Benefits	Costs	Explanation
Nutrition Labeling of Meat and Poultry Products.	USDA—FSIS	205	25-32	Present value estimates amortized over 20 years.
Food Labeling (combined analysis of 23 individual rules).	HHS—FDA	438-2,637	159-249	Present value estimates amortized over 20 years.
Real Estate Settlement Procedures	HUD	258-332	135	
Manufactured Housing Wind Standards ...	HUD	79	511	
Confined Spaces	DOL—OSHA	540	250	We valued each fatality at \$5 million and each lost-workday injury at \$50,000. We did not value non-lost-workday injuries.

Regulation	Agency	Benefits	Costs	Explanation
Occupational Exposure to Asbestos	DOL—OSHA	92	448	We assumed a 20-year latency period between exposure and the onset of cancer or asbestosis and valued each death and each case of asbestosis at \$5 million.
Vessel Response Plans	DOT—Coast Guard.	8	324	Present values amortized over 30 years. We valued each barrel of oil not spilled at \$2,000.
Double-Hull Standards	DOT—Coast Guard.	15	641	Present values amortized over 30 years. We valued each barrel of oil not spilled at \$2,000.
Controlled Substances and Alcohol Use and Testing.	DOT—FHWA	1,539	114	
Prevention of Prohibited Drug Use in Transit Operations.	DOT	107	37	Present values amortized over 10 years.
Stability Control of Medium and Heavy Vehicles During Braking.	DOT—NHTSA	1,650-2,539	694	We valued each "equivalent fatality" at \$3 million.
Oil and Gas Extraction	EPA	35-129	35	First-year costs amortized costs over 15 years and added to annual (15h year) costs.
Acid Rain Permits Regulations	EPA	76,854-77,206	1,109-1,871	We valued SO ₂ reductions at \$7,300 per ton.
Vehicle Inspection and Maintenance (I/M)	EPA	219-992	671	We used the estimates of and cost and emission reductions of the new I/M program compared to the baseline of no I/M program. We valued VOC reductions at \$520-\$2360 per ton. We did not assign a value to CO reductions.
Evaporative Emissions from Light-Duty Vehicles, Light-Duty Trucks, and Heavy-Duty Vehicles..	EPA	243-1,104	161-248	We assumed the VOC emission reductions began in 1995 and rise linearly until 2020, after which point they remain at the 2020 level. Annualizing this stream results in an average of 468,000 tons per year. We valued these tons at \$520-\$2360 per ton.
Onboard Diagnostic Systems	EPA	421-2,383	226	Emission reductions and costs amortized over 15 years. We valued VOC reductions at \$520-\$2360 per ton and NO _x reductions at \$700-\$4900 per ton.
Phase II Land Disposal Restrictions	EPA	26	240-272	We valued each cancer case at \$5 million.
Phase-out of Ozone-Depleting Chemicals and Listing of Methyl Bromide.	EPA	1,260-3,993	1,681	Present values amortized over 16 years.
Reformulated Gasoline	EPA	184-637	1,085-1,395	Estimates are for Phase II, which include Phase I benefits and costs. We used the benefit estimates that assume the enhanced I/M program is in place. We valued VOC reductions at \$520-\$2360 per ton and NO _x reductions at \$700-\$4900 per ton. We valued each cancer case at \$5 million. We assumed the phase II aggregate costs are an additional 25 percent of the Phase I costs based on EPA's reported per-gallon cost estimates.
Acid Rain NO _x Title IV CAAA	EPA	661-4,725	372	Values are for Phase II. We valued NO _x reductions at \$350-\$2500 per ton.
Hazardous Organic NESHAP	EPA	520-2,360	292-333	We valued VOC emissions at \$520-\$2360 per ton and NO _x emissions (which are a cost in this instance) at \$350-\$2500 per ton. We did not value changes in CO emissions.
Refueling Emissions from Light-Duty Vehicles.	EPA	148-673	33	We assumed Stage II controls will remain in place and valued VOC emissions at \$520-\$2360 per ton.

Regulation	Agency	Benefits	Costs	Explanation
Non-Road Compression Ignition Engines	EPA	412-2,881	29-70	We annualized the NO _x emissions which yielded an average annual emission reduction of 588,000 tons beginning in 2000. We valued NO _x emissions at \$700-\$4900 per ton.
Bay/Delta Water Quality Standards	EPA	2-26	37-248	
Deposit Control Gasoline	EPA	374-1,480	197	We valued estimates of combined emission reductions at \$520-\$2360 per ton. Present value cost estimates amortized over 5 years.
Total		86,290-106,708	9,506-11,087	